

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON DC 20554

RECEIVED

JUN 25 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

IN THE MATTER OF:

AMENDMENT OF SECTION 73.202(B)  
TABLE OF ALLOTMENTS  
FM BROADCAST STATIONS  
CLAYTON, NEW MEXICO

BC DOCKET NO:  
RM NO:

TO: CHIEF, ALLOCATIONS BRANCH

PETITION FOR RULE MAKING

COMES NOW, Clayton Community Broadcasters, through counsel, and pursuant to the provisions of Section 1.401 of the Commission's Rules (47 C.F.R.1.401) requesting that the Table of Allotments in Section 73.202(b) of the Federal Communications Commission's Rules and Regulations be amended.

Clayton Community Broadcasters hereby requests that the FM Table of Allotments in Section 73.202(b) be amended to allot channel 248C1 to Clayton, New Mexico<sup>1</sup>. Accordingly, the allotment for channel 248C1 at Raton, New Mexico must be deleted. Clayton Community Broadcasters requests that the FM Table of Allotments be amended as follows:

Location	Present	Proposed
Raton, New Mexico	230C1, 243A 248C1 (was 249A)	230C1, 243A
Clayton, New Mexico	-----	248C1

<sup>1</sup> On June 10, 2003, by letter to N'Joy Broadcasting, the Federal Communications Commission, by Edward P. De La Hunt, Associate Chief, Audio Division, Media Bureau, dismissed as unacceptable for filing an application filed by N'Joy Broadcasting for a license to cover its construction permit for KGOY, Raton, New Mexico. That application was dismissed as patently defective pursuant to 47 C.F.R. Section 73.3566. The Commission's database was revised to reflect the expiration of Construction Permit BMPH-20001103ABS as of its expiration date, August 31, 2001. Call sign KGOY was deleted and application BMPH-20011217AAI was dismissed as unacceptable for filing. A copy of the Commission's letter of June 10, 2003 to N'Joy Broadcasting is attached to this Petition for Rulemaking as *Exhibit One*. With the dismissal and return of these applications, there is no reason why the Commission cannot consider this rule making request as filed by Clayton Community Broadcasters.

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There are compelling, public interest justifications for granting this rule making, and in support thereof, the following is shown:

### **1. PRELIMINARY STATEMENT**

Raton, New Mexico is already served by three (3) AM and FM radio facilities. Clayton, New Mexico, a census designated place, is served by only one (1) full-time AM station. The allotment of channel 248C1 to Clayton, New Mexico will result in a first, full-time, wide-area FM broadcast service to the community. This new FM facility at Clayton, New Mexico will provide service to 15,650 persons.

Clayton, New Mexico is the County Seat of Union County, New Mexico. Clayton has nine churches, six motels, five recreation facilities, one golf course, an elementary, middle, Jr. High and High School. Clayton has 1,261 single family homes, 55 multi-family homes and 211 mobile homes. The community has two banks, four full time police officers, three full time firefighters, seventeen volunteer firefighters and one hospital. Clayton, New Mexico has more than eight restaurants, its own Post Office, Tourist Information Center, Senior Citizen Center, Library and Courthouse. There is one weekly newspaper in Clayton, *The Union County Leader*. There are many organizations in Clayton and Union County including Boy Scouts, Girl Scouts, 4-H and FHA. Other organizations include an American Legion Post, a garden club, NRTA and AARP, a hospital auxiliary, Lions Club, Rotary Club, the Union County Historical Society, VFW and several extension clubs. There are lodges such as Masons, Order of Eastern Star, and the Knights of Columbus. Clearly, Clayton is a thriving, independent community which will benefit from the allotment of a wide-area, first FM broadcast service.

Such an amendment of the FM Table of Allotments would further the Commission's goal of providing a more efficient use of the FM Spectrum by providing a local FM broadcast service at Clayton, New Mexico. The Amendment of Section 73.202(b) of the Commission's Rules to delete channel 248C1 from Raton New Mexico and to re-allot channel 248C1 to Clayton, New Mexico would provide coverage to a substantial area and population. Certainly, the citizens of Clayton and, additionally, those citizens in the predicted 1.0 mV/m contour of the proposed facility, would benefit from a first, full time, wide area FM broadcast service.

## **II. ENGINEERING CONSIDERATIONS**

Petitioner's engineering exhibit, as attached, provides a channel study of the FM band. That study concludes that Channel 248C1 would provide city-grade coverage to Clayton, New Mexico. Channel 248C1 could be allotted to Clayton, consistent with the mileage separation and city-grade service requirements of the Commission's Rules, provided that channel 248C1 is deleted from Raton, New Mexico. The consideration of all factors shows that this proposal can be accommodated and that Channel 248C1 can be added to the FM Table of Allotments at Clayton, New Mexico without jeopardizing any other community or facility.


## **III. PETITIONER'S INTENTION TO APPLY FOR CHANNEL 248C1**

If these proposed changes are implemented, the Petitioner intends, pursuant to the Rules of the Commission, to file an application for a construction permit, and if awarded the permit, to promptly construct the facility. Financially, the Petitioner is qualified to construct and operate the facility sought.

**THEREFORE**, in view of the foregoing facts, Petitioner requests that the FM Table of Allotments (Section 73.202(b)) be amended to delete FM Channel 248C1 from Raton, New Mexico and to re-allot channel 248C1 to Clayton, New Mexico.

Respectfully submitted,

CLAYTON COMMUNITY BROADCASTERS

By:  \_\_\_\_\_

Richard J. Hayes, Jr.  
Its Attorney

Richard J. Hayes, Jr.  
Attorney at Law  
8404 Lee's Ridge Road  
Warrenton, Virginia 20186

540-349-9970  
Date: June 23, 2003

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON DC 20554**

**IN THE MATTER OF:**

**AMENDMENT OF SECTION 73.202(B)  
TABLE OF ALLOTMENTS )  
FM BROADCAST STATIONS  
CLAYTON, NEW MEXICO**

**BC DOCKET NO:  
RM NO:**

**NOTICE OF PROPOSED RULE MAKING**

**Adopted:**

**Released:**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Petition for Rule Making submitted by Clayton Community Broadcasters requesting the deletion of the vacant allotment on Channel 248C1 at Raton, New Mexico and the re-allotment of channel 248 C1 at Clayton, New Mexico.
2. Channel 248C1 can be allotted to Clayton, New Mexico in compliance with the Commission's minimum distance separation requirements as evidenced in the attached engineering statement. Petitioner states that the public interest would benefit from the allotment of this channel as it would provide Clayton with a first, wide area FM broadcast service.
3. In order to effectuate this proposal, the Commission proposes to amend the Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following communities:

<b>Location</b>	<b>Present</b>	<b>Proposed</b>
Raton, New Mexico	230C1, 243A 248C1 (was 249A)	230C1, 243A
Clayton, New Mexico	-----	248C1

4. The Commission's authority to institute rule making proceedings, showings required, cutoff procedures, and filing guidelines are incorporated by reference, herein. NOTE: A showing of continuing interest is required by Paragraph 2 of the Appendix before a channel will be assigned.

**Notice of Proposed Rule Making**  
**Page Two**

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5. Interested parties may file comments on or before, and reply comments on or before, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the Petitioner, as follows:

Richard J. Hayes, Jr., Esquire  
8404 Lee's Ridge Road  
Warrenton, VA 20186  
Counsel to Clayton Community Broadcasters

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Assignments, Section 73.202(b), of the Commission's Rules. See, Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact the Mass Media Bureau (202) 418-2710. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex parte contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An ex parte contact is a message (spoken or written) officially filed at the Commission or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Chief, Policy and Rules Division  
Mass Media Bureau

**EXHIBIT ONE**

**FCC JUNE 10, 2003 LETTER TO  
N'JOY BROADCASTING**

**FEDERAL COMMUNICATIONS COMMISSION**  
**445 TWELFTH STREET SW**  
**WASHINGTON DC 20554**

**MEDIA BUREAU / OFFICE OF BROADCAST LICENSE POLICY**  
**AUDIO DIVISION**  
**APPLICATION STATUS:** (202) 418-2730  
**HOME PAGE:** [www.fcc.gov/mb/audio/](http://www.fcc.gov/mb/audio/)

**ENGINEER:** CHARLES N. (NORM) MILLER  
**ATTORNEY:** STEPHEN SVAB  
**TELEPHONE:** (202) 418-2700  
**FACSIMILE:** (202) 418-1410  
**INTERNET ADDRESS:** [charles.miller@fcc.gov](mailto:charles.miller@fcc.gov)  
[stephen.svab@fcc.gov](mailto:stephen.svab@fcc.gov)

**JUN 10 2003**

N'Joy Broadcasting  
8264 South Cody  
Littleton, Colorado 80123

**Re: KGOY (FM), Raton, New Mexico**  
**Facility Identification Number: 78978**  
N'Joy Broadcasting

Application for License, BLH-20010831AAI  
Construction Permit BPH-19960124MA, as modified by  
BMPH-20001103ABS  
Application for Modification  
of Construction Permit, BMPH-20011217AAI  
Informal Objections

Dear Permittee:

The staff has before it: 1) Application BLH-20010831AAI, filed on behalf of N'Joy Broadcasting ("N'Joy"), for license to cover Construction Permit BPH-19960124MA, as modified by Permit BMPH-20001103ABS, which authorizes construction of FM station KGOY to operate on Channel 248C1 at Raton, New Mexico; 2) Application BMPH-20011217AAI, for further modification of N'Joy's permit; and 3) Informal Objections to the foregoing applications filed on November 28, 2001, and January 11, 2002, by Phillips Broadcasting, Inc. ("Phillips"). For reasons which are discussed herein, the application for license is dismissed as patently defective, the construction permit is forfeited and Call Sign KGOY is deleted, N'Joy's application for modification of its permit is dismissed, and Phillips' Informal Objections are dismissed as moot.<sup>1</sup>

*Background.* On August 31, 1998, the staff granted N'Joy's application to construct a new Class C1 FM station serving Raton, New Mexico (Construction Permit BPH-19960124MA) on Channel 248 (97.5 MHz).<sup>2</sup> The permit was subsequently modified on July 17, 2001, by grant of

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<sup>1</sup> We note that, in a separate action, a Petition for Rule Making filed on November 28, 2001, by Clayton Community Broadcasters ("CCB"), which proposed deletion of the allotment for Channel 248C1 at Raton, NM, and the addition of Channel 248C1 to Clayton, NM, was returned as unacceptable for filing. See letter dated April 4, 2003, from John A. Karousos, Assistant Chief, Audio Division, to Richard J. Hayes, Jr., Esq., Counsel to CCB.

<sup>2</sup> The permit authorized construction of a Class C1 station with effective radiated power of 100 kilowatts and antenna height above average terrain of 257 meters.

N'Joy's Application BMPH-20001103ABS.<sup>3</sup> The permit was set to expire on August 31, 2001.<sup>4</sup> On the permit's expiration date, August 31, 2001, N'Joy filed the subject license application. As discussed below, the facilities specified in the license application did not match those authorized in Construction Permit No. BMPH-20001103ABS. Nearly four months later, on December 17, 2001, N'Joy filed an application for modification of the construction permit to conform it to the facilities actually constructed, the same facilities as were specified in the license application.

*Discussion.* Our review of the license application indicates that a Class A facility was constructed.<sup>5</sup> In a narrative statement in the license application, N'Joy admitted that the authorized tower had not been erected to its full height and that installation of commercial electrical power to the site had not been completed, which together acted to prevent construction and/or operation of the full, authorized facilities.<sup>6</sup> The record clearly demonstrates that N'Joy constructed at substantial variance from its permit, for which no timely operating authority was sought or given. Additionally, in its response to Item 2, Section II of Form 302-FM, the applicant certified by its affirmative response that "...all terms, conditions, and obligations set forth in the underlying construction permit have been fully met." In view of the gross disparities between the facilities authorized and those constructed, the applicant's certification in Item 2 clearly is inaccurate. In view of the foregoing, we find that the license application is patently defective and thereby subject to dismissal.<sup>7</sup>

The rules regarding permit expiration adopted in the Commission's Streamlining initiative<sup>8</sup> have a bearing on this case. Pursuant to these rules, an applicant who has not completed construction as authorized<sup>9</sup> within an unencumbered three-year period forfeits its permit unless it can

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<sup>3</sup> See Application No. BMPH-20001103ABS, granted on July 17, 2001.

<sup>4</sup> See 47 C.F.R. § 73.3598(a), and the *Memorandum Opinion and Order In the Matter of 1998 Biennial Regulatory review – Streamlining of Mass Media Applications, Rules, and Processes* ("Streamlining MO&O"), 14 FCC Rcd 17525, 17536 (1999).

<sup>5</sup> The license application specified effective radiated power of 0.02 kilowatt and antenna height of 224 meters above average terrain, considerably less than the facilities authorized by Permit BPH-19960124MA, as modified by BMPH-20001103ABS.

<sup>6</sup> In the license application, N'Joy states that "due to massive health problems . . . [and] technical difficulties," KGOY was constructed as a minimal Class A station rather than as a Class C1 facility as authorized. Permittee's engineer states that permittee was advised by the Commission staff that no extension of a broadcast construction permit was acceptable regardless of the reason for delay, and therefore "[N'Joy] constructed these temporary facilities and hereby files for license with these facilities."

<sup>7</sup> See 47 C.F.R. § 73.3566(a) (directing the staff to dismiss nonconforming applications unaccompanied by an appropriate request for waiver).

<sup>8</sup> See *Report and Order, Streamlining of Mass Media Applications*, MM Docket No. 98-43, 13 FCC Rcd 23056, Para. 77-90 (1998); 63 Fed. Reg. 70,039 (December 18, 1998); rules effective February 16, 1999.

<sup>9</sup> A broadcaster cannot preserve its authorization by building and operating with nonconforming facilities. See, e.g.,



demonstrate that the construction period was "tolled" by narrow circumstances not within the permittee's control.<sup>10</sup> Our records indicate that N'Joy has had three unencumbered years to construct subsequent to the grant of its initial permit, and it did not file a request either for tolling or for waiver of the Commission's rules. Therefore, as a result of our dismissal of the subject license application and the substantially nonconforming facilities constructed by N'Joy, the KGOY permit is subject to automatic forfeiture as of the August 31, 2001, expiration date.<sup>11</sup>

The Commission also has before it Application BMPH-20011217AAI, filed by N'Joy on December 17, 2001, proposing to modify the permit to conform it to the "as-built" facilities. However, in light of the above, the application is untimely. It is well settled that an expired construction permit cannot be modified; therefore Application BMPH-20011217AAI must be dismissed as unacceptable for filing.

Accordingly, in light of the foregoing, License Application BLH-20010831AAI IS HEREBY DISMISSED as patently defective pursuant to 47 C.F.R. Section 73.3566. The Commission's data base will be revised to reflect the expiration of Construction Permit BMPH-20001103ABS as of its expiration date, August 31, 2001, and Call Sign KGOY IS HEREBY DELETED. Application BMPH-20011217AAI IS HEREBY DISMISSED as unacceptable for filing. In light of the action taken herein, the Informal Objections filed on November 28, 2001, and January 11, 2002, by Phillips Broadcasting, Inc. ARE DISMISSED as moot.

Finally, we caution N'Joy that any operation from the facilities ostensibly covered by License Application BLH-20010831AAI are unauthorized and MUST CEASE IMMEDIATELY.<sup>12</sup> Nevertheless, it is imperative to the safety of air navigation that any prescribed painting and illumination of the station's tower be maintained until the tower is dismantled. Accordingly,

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*Idaho Broadcasting Consortium*, 16 FCC Rcd 21558 (M.M. Bur. 2001) (A licensee cannot avoid the statutory expiration of its license pursuant to 47 U.S.C. § 312(g) by operating at variance from its licensed facilities).

<sup>10</sup> These narrow circumstances include "Acts of God" such as floods or tornadoes and when the permit grant is subject to administrative or judicial review.

<sup>11</sup> The staff previously has taken similar actions in similar situations. *Letter to Peter Gutmann, Esq. (Call sign DKZTY(AM), Winchester, Nevada)*, reference 1800B2 (Aud. Serv. Div. Nov. 22, 1999), *recon. denied*, *Letter to Peter Gutmann, Esq. (Call sign DKZTY(AM), Winchester, Nevada)*, reference 1800B2 (Aud. Serv. Div. Dec. 21, 2000) (license application dismissed as patently defective, underlying permit ultimately declared forfeit). *See also Letter to John A. Borsari, Esq. (WQBS(AM), San Juan, Puerto Rico)*, reference 1800B2 (Aud. Serv. Div. June 3, 1999, *application for review pending* (license application reveals construction of fundamentally different facilities than those authorized, dismissed as patently defective, underlying permit subject to forfeiture).

<sup>12</sup> *See Idaho Broadcasting Consortium, supra*, and 47 U.S.C. § 301, which requires that broadcast stations be operated in accordance with the Communications Act and under the terms and conditions of an authorization granted by the Commission. *See also Joseph I. Kendrick, Permittee (WDBS(FM), Bolingbroke, Georgia)*, 11 FCC Rcd 19635 (1996) (permittee constructing after permit expiration ordered to cease operation.)

pursuant to 47 U.S.C. Section 303(q), the tower owner must maintain the tower as prescribed in the Commission's rules and the terms of the expired construction permit until it is dismantled completely.<sup>13</sup>

Sincerely,



Edward P. De La Hunt  
Associate Chief  
Audio Division  
Media Bureau

cc: Richard J. Hayes, Jr., Esq.

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<sup>13</sup> See 47 C.F.R. §§ 17.1 *et seq.* and 73.1213. See also *streamlining the Commission's Antenna Structure Clearance Procedure*, 11 FCC Rcd 4272 (1995).

JOHN J. MULLANEY  
JOHN H. MULLANEY, P.E. (1994)  
ALAN E. GEARING, P.E.

**MULLANEY ENGINEERING, INC.**

9049 SHADY GROVE COURT  
GAITHERSBURG, MD 20877

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**ENGINEERING EXHIBIT EE-RM:**

**RULE MAKING TO AMEND  
FM TABLE OF ALLOTMENTS**

**DELETE CH. 248C1 AT RATON, NM  
ALLOT CH. 248C1 TO CLAYTON, NM**

**JUNE 23, 2003**

**ENGINEERING STATEMENT PREPARED ON BEHALF OF  
CLAYTON COMMUNITY BROADCASTERS**

**ENGINEERING EXHIBIT EE-RM:**

**RULE MAKING TO AMEND  
FM TABLE OF ALLOTMENTS**

**DELETE CH. 248C1 AT RATON, NM  
ALLOT CH. 248C1 TO CLAYTON, NM**

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2. Narrative Statement
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From City Point for Clayton, NM
4. Figure 2, General Area Map.

## Declaration

I, John J. Mullaney, declare and state that I am a graduate electrical engineer with a B.E.E. and my qualifications are known to the Federal Communications Commission, and that I am an principal engineer in the firm of Mullaney Engineering, Inc., and that I have provided engineering services in the area of telecommunications since 1977. My qualifications as an expert in radio engineering are a matter of record with the Federal Communications Commission.

The firm of Mullaney Engineering, Inc., has been requested by Clayton Community Broadcasters, to prepare the instant engineering exhibit in support of a rule making petition to amend the FM Table of Allotments.

All facts contained herein are true of my own knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.

/s/ John J. Mullaney

John J. Mullaney, Consulting Engineer

Executed on the 23th day of June 2003

**ENGINEERING EXHIBIT EE-RM:**

**RULE MAKING TO AMEND  
FM TABLE OF ALLOTMENTS**

**DELETE CH. 248C1 AT RATON, NM  
ALLOT CH. 248C1 TO CLAYTON, NM**

**NARRATIVE STATEMENT:**

This engineering statement has been prepared on behalf of Clayton Community Broadcasters. The purpose of this statement is to provide engineering in support of a rule making petition to amend the FM Table of Allotments to delete Ch. 248C1 at Raton, New Mexico and re-allot Ch. 248C1 to Clayton, New Mexico.

Upon deletion of Ch. 248C1, the city of Raton, NM (Colfax County) will continue to be served by three aural services (1 AM full-time, 2 Commercial FMs & 4 FM translators). Grant of this re-allotment proposal will result in the **second** aural service (1 AM full-time & 2 FM translators) to Clayton, NM (county seat of Union County).

The proposed reference point is not within 290 kilometers (180 miles) of a United States Border and, therefore, foreign concurrence is not required.

## Proposed Reference Site

For the purposes of this rule making the applicant proposes to use the city reference coordinates for Clayton, NM.

N. Latitude:            36° 27' 00"    NAD-27  
W. Longitude:        103° 11' 00"

The proposed reference site will provide an unobstructed view of the city of license and is located close enough to serve the entire community with the required 3.16 mV/M or 70 dBu contour. Figure 2 is a general area map showing Clayton, NM.

## Channel Allocation Study

Figure 1 is a Channel Allocation Study from the city reference point for Clayton, NM. The study indicates the actual & required separation in kilometers to all licenses, construction permits, applications, vacant allocations and pending rule makings. From this study it can be determined that proposed reference point exceeds all of these minimum separations **provided** Ch. 248C1 is deleted from Raton, NM. All stations are at least 100 km beyond the minimum separations required by the rules, thus, permitting a wide range of sites at Clayton.

The construction permit for Ch. 249A issued for Radio Station KGOY was cancelled 6/10/2003.

## **Public Interest Showing**

The proposed allotment of Ch. 248C1 will provide Clayton, NM (2,524 persons 2000 Census) its second aural service and a first FM service. The proposed facility will potentially provide 60 dBu service to 15,650 persons.

Upon deletion of Ch. 248C1 the city of Raton, NM (Colfax County) will continue to be served by three aural services (1 AM full-time, 2 Commercial FMs & 4 FM translators).

Based upon the above information, Clayton Community Broadcasters believes that its request results in a preferential arrangement of allotments and therefore, serves the public interest.



**SUMMARY**

Clayton Community Broadcasters requests that the FM Table of Allotments be amended to delete Ch. 248C1 at Raton, NM and re-allot Ch. 248C1 to Clayton, NM.

	<b>Present</b>	<b>Proposed</b>
Raton, NM	230C1, 243A, 248C1 (was 249A)	230C1, 243A
Clayton, NM	- - -	248C1

Clayton Community Broadcasters believes that the proposed change in community and upgrade to Class C facilities will serve the public interest. If the requested allotment is granted, Clayton Community Broadcasters will file an application for construction permit during the appropriate auction window.

/s/ John J. Mullaney

John J. Mullaney, Consulting Engineer

June 23, 2003.

FMCONT<sup>TM</sup> LOCATE STUDY CH 248 C1 97.5 MHz  
 Clayton Community Broadcasters  
 June 2003

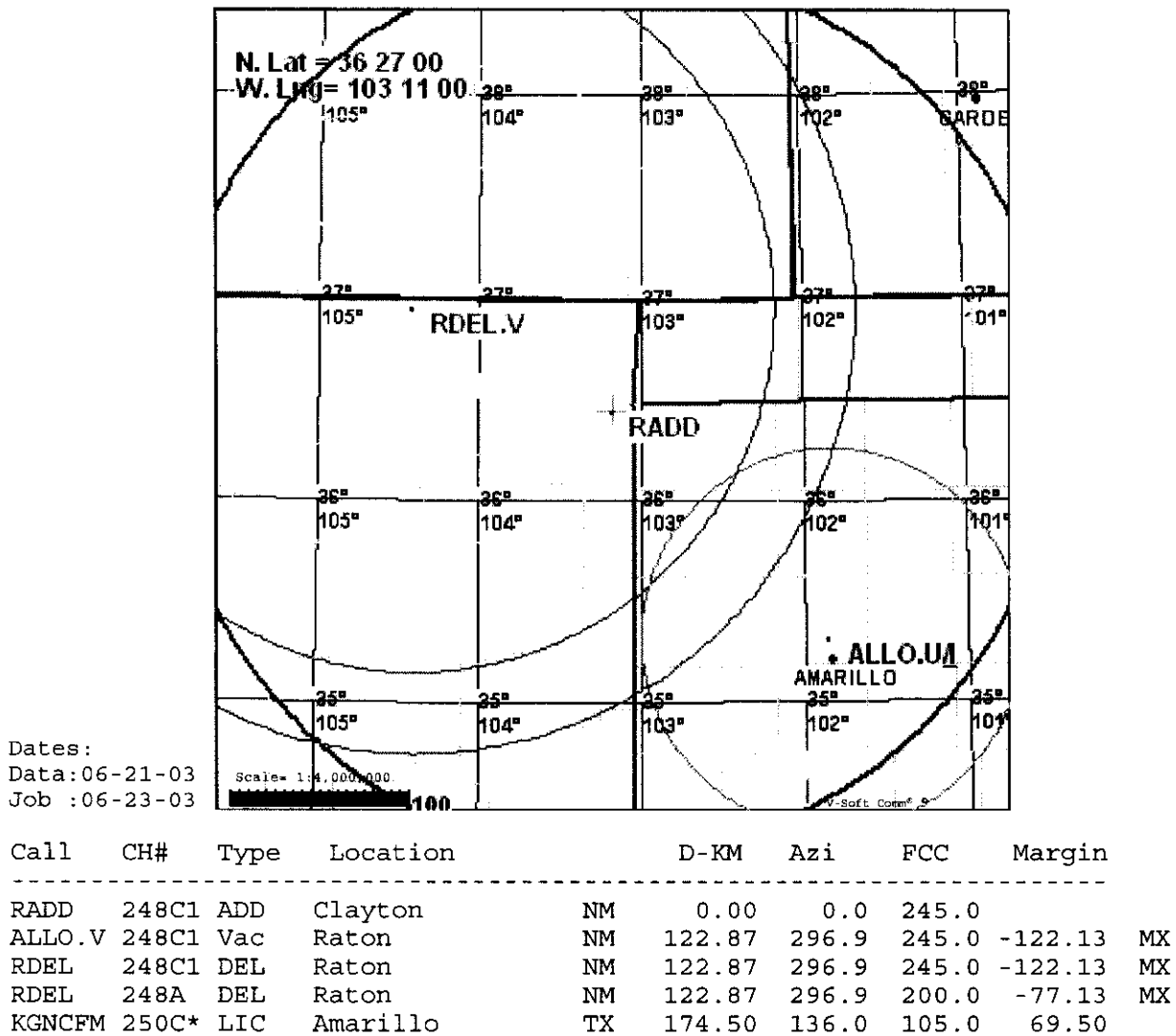
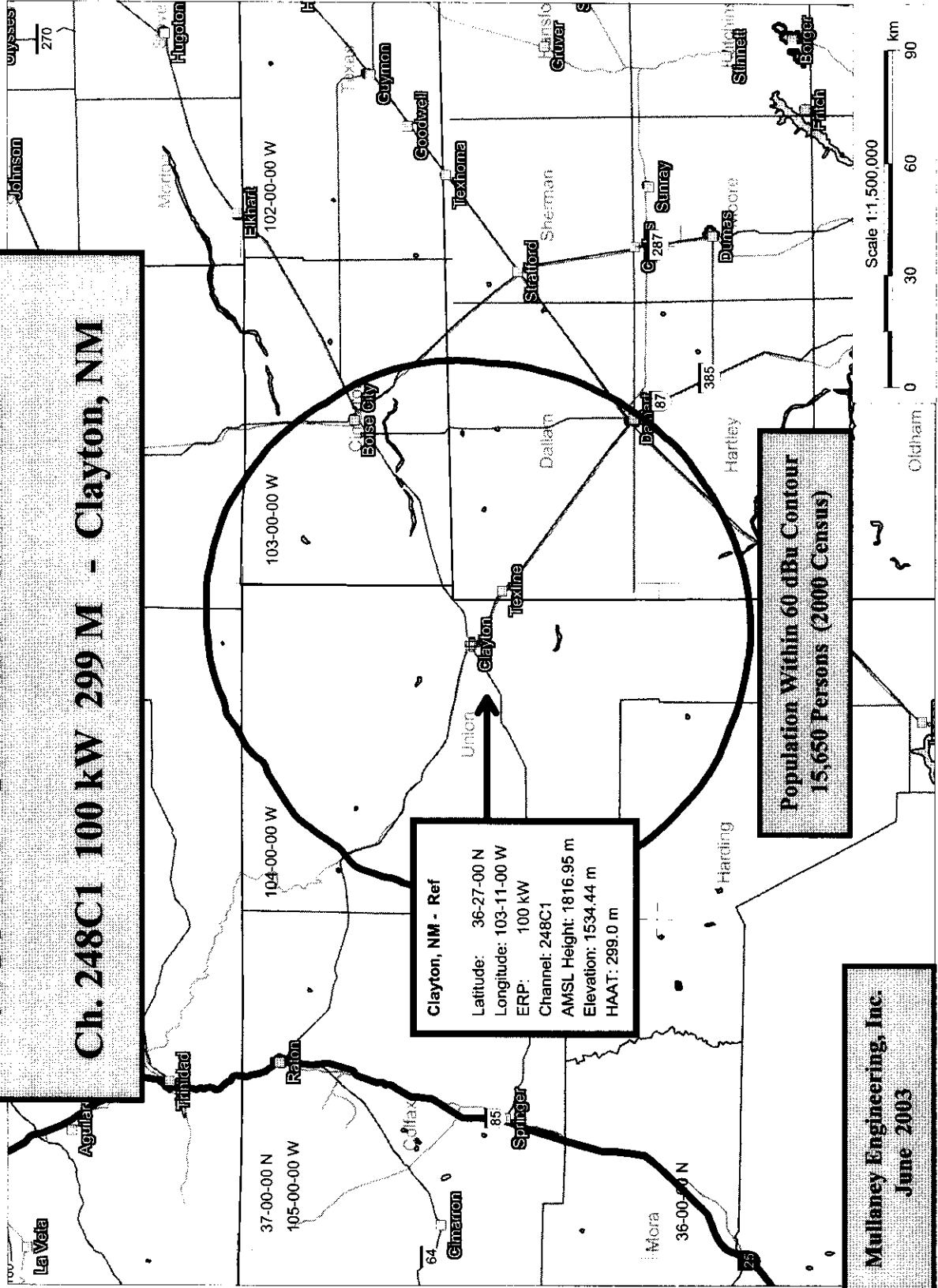


FIGURE 1 - FM CHANNEL STUDY - 248C1 - CLAYTON, NM  
 June 2003

# FIGURE 2 - GENERAL AREA MAP

Ch. 248C1 100 kW 299 M - Clayton, NM



Mullaney Engineering, Inc.

June 2003